IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 16 of 1986

WITH

CRIMINAL APPEAL No 53 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GIRISH BACHUBHAI NAGAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 16 of 1986
   MS JYOTSNA PATEL with MR VIJAY H PATEL for Appellant1
   MR KC SHAH, APP for Respondent No. 1
2. Criminal Appeal No. 53 of 1986
   MR MANOJ N POPAT for Appellant
   MR KC SHAH, APP for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 08/03/2002

ORAL COMMON JUDGEMENT

1. B oth these appeals have been filed by original accused nos. 1 and 2 of Sessions Case No. 101/1985 u/S. 374 (2) of the Code of Criminal Procedure (for short 'Cr.P.C.') They have been convicted by the Ld. City Sessions Judge, Ahmedabad vide judgment dated 24/12/1985 for committing offence u/S. 147 of the Indian Penal Code (for short 'IPC') and they have been sentenced to suffer RI for three months and to pay fine of Rs.500/-, in default RI for one month.

2. According to the prosecution case, both these appellants were members of unlawful assembly which had collected on 19th April, 1985 in the area known as Bhanderi Pole, Kalupur in the City of Ahmedabad. The crowd had collected there with a view to commit acts of rioting, physical violence and also causing damage to private as well as Government properties. According to the prosecution, there were two crowds belonging to two different communities being Hindus and Muslims, which had got collected at about 11.00 p.m. on that day. Members of these crowds were having weapons as well as burning rags, torches, stones, etc. with them. The crowds started indulging into destructive activities and also causing physical violence. As a result of this, the police was informed and it came there when the crowds were still indulging into illegal activities. Upon seeing the police, the members of the crowds started running helter-skelter . The police could however manage to arrest present appellants from the crowds. They were thereafter taken to the concerned police station. Both these persons were arrested by Police Sub Inspector Mr. J.N. Parmar. At Kalupur Police Station first information report was lodged by P.S.I. Mr. Bareth wherein names of the present appellants were shown as accused. In pursuance to the said FIR offence was registered against unknown persons together with the present appellants. After completion of investigation, the police submitted chargesheet in the Court of the Ld. Metropolitan Magistrate, who in turn committed the case to the Court of Sessions as offence u/S. 304 read with section 149 of the IPC is exclusively triable by the Court of Sessions.

3. At the trial, the Ld. trial Judge framed charge against the appellants for various offences including offence u/S. 304 read with section 149 of the IPC on 20/11/1985 at Exh. 4. The appellants denied the charge

and claimed to be tried.

3.1. During trial, the prosecution examined in all 11 witnesses and all of them belonged to the Police Department. Over and above this, the prosecution placed reliance on certain documentary evidence in support of its case. Upon completion of the recording of the oral evidence, the trial Court recorded further statement of the appellants u/S. 313 of the Cr.P.C. and put all the incriminating circumstances appearing against them in the evidence to enable them to render explanation, if they so desired. Their case is that they have been falsely involved in this case and they were not present in the crowds at the time when the incident took place. According to them, they had not been apprehended from the place of the incident. On conclusion of the trial, the Ld. trial Judge found that the prosecution was not able to prove all the offences with which the appellants were charged except the one u/S. 147 of the IPC. He, therefore, convicted the appellants for the said offence and has imposed sentence which is already described above.

4. Ms. Jyotsnaben Patel and Mr. Manoj Popat have appeared respectively for appellants of Criminal Appeal No. 16 of 1986 and Criminal Appeal No. 53 of 1986. They have submitted that the prosecution has not been able to prove case against the appellants beyond any reasonable doubt and, therefore, they are entitled to have acquittal by virtue of benefit of doubt to be given to them. They have further submitted that there is nothing on record to show that both the appellants had indulged into committing any overt act and that no incriminating article was found from their possession and hence they have been wrongly involved in this case. They have also submitted that there is no independent evidence available on record so as to inspire confidence of the Court. According to them, these appeals therefore, are required to be allowed.

4.1. As against that, Mr. K.C. Shah, Ld. APP appearing for respondent - State in both these appeals, has submitted that the judgment and orders of conviction and sentence passed by the trial Court are proper and there is no reason for any interference by this Court. The counsels have taken me through the entire record of the case and I have also reappreciated the evidence in light of the submissions made by them.

5. With a view to establish that on 19/4/1985 two crowds had got collected in area known as Bhanderi Pole,

Kalupur, in City of Ahmedabad at about 11.00 p.m. with a view to indulge into disruptive activities including causing physical harm and the present appellants were members of those crowds, the prosecution has examined Sukhdev Shambhudan Bareth P.W. 4 Exh. 24. He at the relevant time, was attached to Kalupur Police Station. He is the complainant of this case. He has stated that on 19/4/1985 a message was received from mobile No. 1 to the effect that near Kalupur Bhanderi Pole, two crowds belonging to different communities were facing each other and they were throwing burning rags and stones. He, therefore, with S.P. Mr. Jadeja and P.S.I. Mr. Parmar alongwith staff members went to Bhanderi Pole. At the scene of offence they witnessed the crowd of about 500 persons pelting stones. When the members of the crowd noticed arrival of the police, they started running helter skelter. P.S.I. Mr. Parmar apprehended one person from the crowd and on inquiry he revealed his name to be Saiyed Nashir Saiyed, resident of Dariyapur, Popatiya Vad. He was immediately made to sit in mobile van. When the police proceeded further from that place towards Pathanvada, they met Head Constable of State Reserve Police Mr. Shivchand B. Yadav, who had received injury on the upper part of the right eye due to stone throwing. He also informed the complainant and others that for dispersing the crowds he had fired one round from his .410 musket and other constables under him had fired 2 to 3 rounds from 303 rifles. The witness has further stated that they made arrangement to send Shivchand, Head Constable to the hospital for treatment. He has further stated that while they were at the entrance of Pathanvad, a crowd of about 500 persons came from Sultanvada side and started pelting stones on them. They also noticed one godown of boot chaples set to fire. They had actually brought out some goods from that godown on the road and they were set ablaze. The police issued warning to the crowd to get dispersed, but they did not pay any heed to the same. Hence, police force fired tear gas shells around 25 in number. During this time Mr. Parmar apprehended one person from the crowd and on inquiry he gave his name as Girish Bachubhai Nagar. Since the crowd did not disperse, police ultimately resorted to firing and later on it was learnt that one Balkrushna Amarsinh had received injuries on account of hit by the bullet. One person in this incident died as a result of a stone hitting his head. The witness has further stated that at the Kalupur Police Station, he had given detailed complaint about the incident. He also identified the appellants in the Court room as the persons who were apprehended on the spot at the time of aforesaid incident. In the cross-examination he has

denied the suggestion put to him by the defence that it was not true that appellant Girish was not a member of the crowd and that he was apprehended on the next day at about 6.00 O'clock in the morning while he was going to get milk. In the cross-examination on behalf of the accused no. 2 i.e. appellant Saiyed Nasir Saiyed, he has denied the suggestion that the said appellant was wrongly apprehended in place of his brother who was a bootlegger. Nothing of any importance has been elicited from the cross-examination of this witness so as to discredit his evidence. The complaint given by this witness is brought on record at Exh. 25. His evidence is more or less in consonance with the contents of the complaint.

5.1. Shivchand B. Yadav P.W. 6 Exh. 27 has stated in his evidence that at the time of incident he was working as Head Constable in S.R.P. and on 19/4/1985 he was on duty at S.R.P. point set up near Pathanvada entrance in Kalupur locality. On the night of 19/4/1985 at about 11.00 p.m. a crowd of around 500 persons approached them from the side of Topivada Pole. It was proceeding towards Bhanderi Pole. Since there was curfew imposed in this locality, the S.R.P. personnel tried to stop the crowd from proceeding further. However, the members of the crowd kept on proceeding ahead and they also started pelting stones. He has stated that one such stone landed on upper part of his right eye and caused injury. Since the crowd did not come under control, the police had to resort to firing of 410 musket and 303 rifles. He has stated that his statement was recorded by the police during investigation on the next day. There is practically no cross-examination of this witness by the defence.

5.2. Amarsing Bhikhusing Bhimavat P.W. 7 Exh. 28 has stated in his evidence that on 19/4/1985 he was discharging his duties as P.S.I. Kalupur Police Station. During those days anti-reservation riot as well as communal riots were going on in the city and curfew was imposed in many parts of the city. At about 11.00 p.m. wireless message was received at the police station that crowd was indulging into heavy stone throwing in Kalupur Bhanderi Pole and hence several police personnel such as Superintendent Mr. Jadeja, P.S.I. Mr. Bareth, he himself, etc. went to the spot in different vehicles. When they reached there, heavy stone throwing was already going on. Despite repeated warnings, the crowd did not listen and did not get dispersed. Due to stone throwing Shivchand Yadav of S.R.P. received injury. He has further stated that from the crowd P.S.I. Mr. Parmar

had apprehended one person, but he has stated that he did not remember what was his name. He has further stated that on account of the riot Shivchand Yadav as well as one person from the public had also received injuries and he was apprehended by the police and immediately sent to the police station. He has, however, identified both these persons in the Court room. In the cross-examination by the defence, he has stated that near Pathanvada locality there were two crowds belonging to Hindus and Muslims communities opposite to each other and members of the crowds were having burning rags and stones. He of-course could not say in which hand the burning rags were held by the miscreants. He has further stated that he had no idea from where appellant of Criminal Appeal No. 16 of 1986 was apprehended. He came to know about this fact only on the next day. In the cross-examination on behalf of original accused no. 2 he has stated that accused no. 2 was apprehended by Mr. Parmar. Nothing much has been asked to this witness in the cross-examination.

5.3. Apart from this, prosecution has also examined other witnesses, namely doctor as well as the panchas and the Investigating Officer. Their evidence is not required to be discussed in detail in as much as it does not take the case of the prosecution any further.

6. Looking to the evidence of aforesaid eye witnesses, it is very clear that both the appellants were members of the unlawful assembly which had gathered in an area known as Bhanderi Pole, Kalupur and near about it. The members were indulging into the activity of setting fire to various places. They were also indulging into heavy pelting of stones and that had even caused injury to one of the Head Constables, namely Mr. Yadav. Their evidence further reveals that both these appellants were members of the aforesaid crowd, since they were apprehended by Mr. Parmar from the very spot where the incident was going on. In light thereof, I am not inclined to accept the submissions made by Mrs. Patel and Mr. Popat to the effect that the prosecution had not been able to prove that appellants were apprehended during the incident of communal violence. It is also pertinent to note that both these persons were found to be there on the spot, but there is no eidence that they were indulging into committing any act of violence in any manner. However, since the presence of both the appellants in the crowds at the time of commotion is amply established, it could safely be inferred that they were members of that unlawful assembly, whose common object was to commit various acts of violence. They were

apprehended and immediately their identity was revealed. Both these persons were taken into custody on that very night. There is, therefore, no reason to doubt the version of the eye witnesses with regard to these persons being members of rioting crowds.

6.1. It is true that in this case except police personnel, no other witness has been examined and, therefore, learned counsels for both the appellants have submitted that for want of independent evidence on record, the appellants deserve to get benefit of doubt. It is not possible for me to accept this contention because this is not one of the ordinary incidents involving one or more than one individuals. In fact there were huge crowds of both the communities. It is a matter of common knowledge that in such events or in such circumstances nobody would venture to be there unless he himself is one of the members of such crowd. Not only that but one even would not come forward to give evidence later on. It is, therefore, futile to search for any independent evidence and the Court also should not insist upon having persons not belonging to law enforcing forces as witnesses. Since members of police force have no axe to grind against any particular person or persons, they can very well be termed as independent witnesses. In light thereof, even in absence of any evidence of private citizen being on record, it would be possible for me to hold that both the appellants were members of the unlawful assembly. The conviction recorded by the learned trial Judge, therefore, of these appellants u/S. 147 is not erroneous. In view of what has been stated hereinabove, these appeals as such have no merits and they are required to be dismissed. However, considering the fact that the incident in question took place on 19/4/1985, no useful purpose would be served by sending them again to jail after lapse of about 18 years. The penal provision u/S. 147 of the IPC provides for imposition of rigorous imprisonment for a maximum period of two years or to pay fine or both. In my opinion, the ends of justice would meet if substantive sentence imposed by the trial Court is replaced by enhancement of fine. The order of substantive sentence of RI for three months is, therefore, set aside and in place thereof the appellants are directed to pay fine of Rs.1,000/- [Rupees one thousand only] each over and above the fine imposed by the trial Court. If the fine is not paid on or before 31/5/2002, the original sentence imposed by the trial Court will stand restored. With this modification, the appeals are dismissed.

[AKSHAY H. MEHTA,J.]

* Pansala.